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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOE LUIS RUBIO, Defendant and Appellant.	H028213 (Santa Cruz County Super. Ct. No. F04263)

Defendant was convicted by jury trial of two counts of felony sexual battery (Pen. Code, § 243.4, subd. (a)) and one count of misdemeanor indecent exposure (Pen. Code, § 314, subd. (1)). He was convicted after a court trial of unlawful possession of testosterone (Health & Safe. Code, § 11377, subd. (a)). Defendant was committed to state prison for a term of five years.

On appeal, defendant claims that the sexual battery counts are not supported by substantial evidence. He also contends that the trial court erred in denying his new trial motion, which was based on juror misconduct. We conclude that substantial evidence supports both sexual battery counts, but we find that the trial court erred in denying defendant's new trial motion. We reverse the judgment and remand the matter for a new trial.

I. Factual Background

Defendant had built a relationship of trust with Gloria P. over a lengthy period of time during which he had been giving massages to both her and her husband. On January 7, 2002, Gloria came to see defendant for a massage. Defendant persuaded Gloria to consume a shot of brandy before the massage and two more shots during the early part of the massage. When the massage commenced, Gloria was wearing just her underpants, with a sheet covering her body. While defendant was massaging her shoulders after she had consumed the third shot, Gloria closed her eyes and "just knocked out." Gloria "wasn't just asleep;" she "was knocked out." The next thing she perceived was hearing a knock on the waiting room door. Gloria could feel that the sheet that had been covering her body had been pulled down, and she felt defendant's leg "rubbed up against my skin" on her leg. Defendant was "on top of" the massage table.

Defendant got off the table and left the room. Gloria saw that her underwear "had been pulled down" part of the way down her buttocks. The sheet had been pulled down below her buttocks. She pulled up her underwear and the sheet so that they did not quite cover her entire buttocks, but then defendant returned. Gloria pretended to be asleep because she was uncertain what had happened. Defendant began massaging her shoulders again, and he then placed her hands on his legs and grabbed one of her hands and put it around his penis. Defendant moved her hand back and forth on his penis, and then he began hitting her hand with his penis. Gloria was "in a freaking state of shock."

Defendant got back on top of the table, "[s]traddled" her legs, pulled down the sheet and her underwear and began "jerking himself off." Defendant initially "was careful not to touch the side of my legs," but Gloria could feel his legs moving. She also felt him rub his penis on the side of her buttocks. Gloria felt a sticky substance being smeared on her buttocks. She abandoned her pretense of being asleep, and she turned to defendant and said "[w]hat the fuck are you doing?"

II. Procedural Background

Defendant was charged by information with two counts of felony sexual battery (Pen. Code, § 243.4, subd. (a)), one count of misdemeanor indecent exposure (Pen. Code, § 314, subd. (1)), and one count of unlawful possession of testosterone (Health & Safe. Code, § 11377, subd. (a)). The possession count was bifurcated for court trial. The jury deliberated for less than two-and-a-half hours before returning with guilty verdicts on the two sexual battery counts and the indecent exposure count. The court convicted defendant of the possession count after a court trial. Defendant's new trial motion was denied, and he was committed to state prison for a term of five years.

III. Discussion

A. Sexual Battery Counts: Sufficiency of the Evidence

"Any person who touches an intimate part of another person while that person is *unlawfully restrained* by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery." (Pen. Code, § 243.4, subd. (a), italics added.) "As used in subdivisions (a), (b), (c), and (d), 'touches' means *physical contact with the skin of another person* whether accomplished directly or through the clothing of the person committing the offense." (Pen. Code, § 243.4, subd. (f), italics added.)

Defendant makes two separate challenges to the sufficiency of the evidence. He was convicted of two counts of felony sexual battery. Defendant contends that there is a lack of substantial evidence of "unlawful restraint" as to both counts. He claims that there is a lack of substantial evidence that the first of the two counts involved a touching of the skin of Gloria's buttocks.

The statute does not define "unlawful restraint." "[T]he unlawful restraint required for violation of section 243.4 is something more than the exertion of physical

effort required to commit the prohibited sexual act." (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661.) "[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will." (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28.)

The sexual acts were defendant's touching of Gloria's buttocks in the act of pulling down her underwear and his rubbing of his penis against her buttocks. The question is whether, in addition to the sexual acts themselves, defendant used "words, acts or authority" to restrict Gloria's liberty against her will. Plainly he did. He obviously intended to restrict Gloria's liberty by encouraging her to consume so much brandy that she passed out. While she appeared to be unconscious, defendant used her hand in an attempt to masturbate himself, and then he repeatedly struck her hand with his penis. This conduct clearly shocked and frightened Gloria. Defendant then climbed up on the table where Gloria lay face down and nearly naked, and he straddled her body. Defendant's acts of inducing and taking advantage of Gloria's unconsciousness, manipulating her body in such a way that she was placed in a state of shock, and straddling her as she lay in a vulnerable position were "aimed at depriving" Gloria of her liberty against her will. Her unconsciousness initially placed her at defendant's mercy. Her shock and defendant's physical presence over and around her body limited her liberty. We conclude that Gloria was unlawfully restrained when defendant committed the sexual acts.

Defendant also contends that there is insufficient evidence that he touched Gloria's *skin* when he pulled down her underwear. Gloria, who was lying face down on the table, testified that defendant "pulled down my underwear." "So, he pulled [down] the sheet and the underwears [*sic*] almost at the same time," and he pulled the sheet and her underpants to the same place. Defendant claims that this testimony cannot support a

felony sexual battery conviction because Gloria did not specify that defendant made contact with her skin.

Defendant relies on *People v. Elam* (2001) 91 Cal.App.4th 298 (*Elam*), but *Elam* does not support his contention. In *Elam*, the defendant contended that substantial evidence did not support a felony sexual battery conviction because there was no evidence that he had touched the victim's skin when he tried to "pull down" the fully clothed victim's pants and fondled her fully clothed buttocks. (*Elam*, at pp. 302-303, 309-310.)

Elam is readily distinguishable. An attempt to pull down a clothed victim's pants does not necessarily entail any contact with the skin of the victim's intimate parts. The perpetrator may not touch anything other than the victim's outer clothing, or skin contact may be limited to the waist area, which is not an intimate part. Here, on the other hand, Gloria was naked except for her underwear and a sheet, and defendant successfully removed both the sheet and the underwear.

A more comparable case to the facts here is this court's decision in *In re Gustavo M.* (1989) 214 Cal.App.3d 1485 (*Gustavo*). In *Gustavo*, the victim testified that the perpetrator "tried to remove" her leotard from her shoulder, "pulled it down from the shoulder," taking the strap of her bra with it, and, "at the same time" touched her breast in a "very awkward caress." (*Gustavo*, at p. 1498.) Although this court acknowledged that, "[o]n the issue of whether the skin on [the victim's] breast was touched, this evidence is unclear," it concluded that the trier of fact could have drawn reasonable inferences from the victim's testimony that supported a finding that the perpetrator had touched the skin of the victim's breast. "[The trier of fact] had the benefit of seeing the witness, which included the observation of her 'indicating.' [The victim's] testimony that appellant touched her breast is substantial evidence of the offense. It is reasonable to infer from that testimony that when appellant pulled the leotard and bra strap down, his hand, making 'a very awkward caress' touched the skin on her breast." (*Gustavo*, at p. 1499.)

Here, as in *Gustavo*, defendant pulled away the only clothing covering Gloria's buttocks. Gloria's description of these events was illustrated by her gestures, indications and use of a doll to inform the trier of fact about precisely how events occurred. It is worthy of note that, when defendant pulled down Gloria's underwear and the sheet while she was unconscious, he did not pull them both down to the same spot. The sheet had been pulled to a much lower level than her underwear. It is improbable that defendant employed a different method the second time he pulled down Gloria's underwear. Given that Gloria could only feel, rather than see, what defendant was doing, her testimony that "he pulled [down] the sheet and [her] underwears [*sic*] *almost* at the same time" reasonably supported a finding of skin contact. While defendant could have pulled Gloria's underwear down *through the sheet*, and thereby avoided skin contact, Gloria's tactile perception that defendant was pulling down the sheet and her underwear "almost" at the same time supported a reasonable inference that the two items were not pulled down as one or at precisely the same time. A rational trier of fact could have concluded that it would have been impossible for defendant to avoid touching the skin of Gloria's buttocks in the process of pulling down her underpants. A reasonable factfinder who observed Gloria's testimony, gestures, and indications could have concluded beyond a reasonable doubt that defendant touched the skin of Gloria's buttocks when he pulled down her underpants.

Substantial evidence supports the jury's verdict on both counts of felony sexual battery.

B. Denial of New Trial Motion

Defendant claims that the trial court erred in denying his new trial motion. His motion was based on the misconduct of an elderly juror who was unable to hear portions of the trial proceedings but failed to notify the court of her difficulties as she had been instructed to do at the beginning of the trial.

1. Background

After the jury was sworn, but before opening statements, Juror #11 reported that she "wasn't able to hear the District Attorney several times, and, um, I'm – I guess I'm a little hesitant to say, you know, 'What was that?'" The following colloquy occurred. "THE COURT: Did you have one of those hearing devices that we had? [¶] [Juror #11]: He gave me one toward the last, but it was not very satisfactory. [¶] THE COURT: That didn't work for you? [¶] [Juror #11]: No. [¶] THE COURT: Do you have any sort of hearing device of your own? [¶] [Juror #11]: I have a hearing aid, but it didn't – did not do the trick. [¶] THE COURT: And how much of the proceedings are you missing? All of what she says, once in a while, a lot? [¶] [Juror #11]: Um, once in a while, I would say. [¶] THE COURT: Okay. Well, we will have you try to use the hearing device. Turn it up and. If I let you stay on the jury, you would have to agree that every single time you can't hear something, you have the right to raise your hand, and then the reporter would either read it back, or we'd have people speak up. [¶] It's very hard to hear in this courtroom, and I'm constantly asking people to speak up and try to understand what they're saying. [¶] Other questions or other comments at this point? [¶] MS. ROWLAND [the prosecutor]: Judge, would it be helpful to sit in a different spot, do you think? [¶] [Juror #11]: I can't hear you. What? [¶] MS. ROWLAND: Would it maybe be helpful to sit in a different spot? [¶] [Juror #11]: Well, I was sitting in the front row. [¶] MS. ROWLAND: And do you have some difficulty hearing now? [¶] [Juror #11]: Uh-huh. [¶] MS. ROWLAND: How is it now? [¶] [Juror #11]: Well, now I can hear you fairly well. [¶] MS. ROWLAND: Okay. [¶] [Juror #11]: You raised your voice a little. [¶] MS. ROWLAND: I'LL [*sic*] try to -- [¶] THE INTERPRETER: Now, the [*sic*] I can't hear. [¶] [Juror #11]: Pardon me?"

The colloquy continued. "THE COURT: How many hearing devices do we have, Deputy Alcantar? So, we have one or the other juror, and then we can – let's go ahead and hook up that one right now. Let's have her use it and be sure I [*sic*] working first of all. [¶] MS. ROWLAND: [Juror #11], how would you feel about raising your hand without having to say 'What?' I mean, would that be more comfortable to you perhaps? [¶] [Juror #11]: Probably. [¶] THE COURT: Why don't we go ahead and have her put that one. Let's try that again and have a dialogue. [¶] MS. ROWLAND: Are you able to hear me any better or about the same? [¶] [Juror #11]: About the same. [¶] MS. ROWLAND: Uh-huh. [¶] [Juror #11]: It makes clicking noises, too. It's not a very good machine."

The court and the prosecutor attempted to see if Juror #11 could hear them, and she said that she could. Defendant's trial counsel then asked Juror #11 if she could "hear that clearly when the microphones are on?" She replied affirmatively. However, when he told her "[t]hat is really the best way for you to actually hear everything," Juror #11 said "I'm sorry, would you say that again." She then asserted that she was "not sure" if she could hear everything when the microphones were used. The court instructed the attorneys to use the microphone. "What we'll do is try and if it's not working, we'll check with you at the break again and see how things are going, but I need to be very clear, every time you can't hear anything, get my attention and raise your hand, all right, and if it's not working, then we'll deal with that. I don't want to give up on you yet. You [have] been through a lot here, and you're important. We want to be sure if we can keep you as part of the jury – are you comfortable with that?" Juror #11 responded "Okay."

After Juror #11 left the courtroom, the prosecutor noted that she did not usually use the lectern, where the microphone was apparently located, because she found it uncomfortable. The court replied: "I won't order anyone to use it, but keep your voices up, if you can, if you're not using it. I won't make it a requirement, but I would like to keep the juror, if I can."

After the completion of the trial, Juror #11 returned a "Jury Questionnaire" in which she commented on her inability to hear portions of the proceedings. Asked what she disliked about her experience as a juror, she said: "Having to strain to hear, and not hearing everything." In response to a request for suggestions, Juror #11 recommended "a better loud-speaking system and making sure the witnesses speak into the mike." She also added the following "Additional comments." "The acoustics were very poor in the court and both the attorneys and the judge talked fast and not very clearly — I had asked to be released because of poor hearing. I still couldn't hear well with the little gadget you gave me and I know I missed a lot of the testimony + also comments in the jury room. I should have been released." The court brought the questionnaire to the attention of counsel.

Defendant moved for a new trial based on the inability of Juror #11 to hear portions of the proceedings. He asked the court to bring Juror #11 in to testify. The court agreed to do so. "Mr. Rubio is entitled to 12 competent jurors and someone who has missed significant portions of a trial would not be competent, and the Court needs to make a decision as to whether or not that was the case. [¶] Ms. Rowland is correct. Everyone in court is going to miss portions of a trial. No matter how short or how long, the attention span is short. Witnesses, attorneys, judges can be boring, and you're going to miss portions of it. [¶] Juror Number 11 tried to quantitate it somewhat. She described it as, I think, 'a lot.' What does that mean? I don't know. I'm going to find that out. . . . I'm going to question her. [¶] . . . I'll . . . try to get a better description, a better understanding of what portions of the trial and deliberations she might have missed and decide whether or not that rendered her an [in]competent juror."

Juror #11 appeared at an in-chambers evidentiary hearing. She said that the hearing device was "almost useless." Once during the trial, she raised her hand and told the judge that she could not hear. However, that was not the only time that she could not hear the proceedings. "Um, may be once or twice during the day, maybe three times

during the day," she would have trouble hearing for "[j]ust a short time." Juror #11 explained that she had always heard the judge, but she found it "hard to hear" defendant's trial counsel. She did not bring her hearing problems to the court's attention because "it's embarrassing." Juror #11 said that she did not have problems hearing the other jurors in the deliberation room.

The trial court concluded that Juror #11 had "overstated" her inability to hear in her questionnaire. "When we asked for specifics, she wasn't able to come up with much of anything that she had missed during the course of the trial other than at times your [defendant's trial counsel's] voice dropped and she missed, my recollection, portions of what you had to say." "I don't find that she was missing a significant portions [*sic*] of the trial. . . . [A]nyone is going to miss some portions of any particular trial." The court denied defendant's new trial motion.

2. Analysis

When a defendant challenges on appeal a trial court's denial of his motion for a new trial on grounds of juror misconduct, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence[;]" the question of "[w]hether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Essentially, the question of whether misconduct actually occurred is reviewed for substantial evidence, while the question of whether any misconduct was prejudicial is subject to independent review.

The first question is whether substantial evidence supports the trial court's implied finding that Juror #11 had not committed any misconduct. It was unmistakably clear, before opening statements at trial, that Juror #11 had a serious hearing impairment. She complained that she was not able to hear, and she had unsuccessfully tried both her hearing aid and a hearing device provided by the court. Juror #11 characterized the portion that she was missing at that point as "once in a while." Even during her brief

colloquy with the court and counsel, Juror #11 repeatedly had trouble hearing what was being said. "I can't hear you. What?" "Pardon me?" "I'm sorry, would you say that again."

The court instructed Juror #11 to notify the court if she could not hear. "I need to be very clear, every time you can't hear anything, get my attention and raise your hand. . . . ." Juror #11 agreed to do so, but, except for a single occasion, she did not notify the court of her inability to hear because she was embarrassed. Instead, two or three times a day, during an *eight-day trial*, she experienced brief periods when she could not hear the proceedings. She had particular difficulty hearing defendant's trial counsel.

The trial court did not conclude that Juror #11 had falsely described her hearing difficulties at the in-chambers hearing. Indeed, the court credited Juror #11's statements that she had "missed . . . portions" of the trial, particularly defendant's trial counsel's words, but it concluded that these missed "portions" were not "significant."

The trial court's implicit finding of no misconduct is not supported by substantial evidence. Juror #11 clearly committed misconduct. A juror commits misconduct when she violates the court's instructions. (*People v. Williams* (2001) 25 Cal.4th 441, 449, 463.) As the trial court found, Juror #11 failed to hear portions of the trial and, notwithstanding the court's explicit instructions, she failed to notify the court of her lack of hearing. We cannot countenance the trial court's dismissal of the missing portions of the trial as not "significant." Since Juror #11 could not know what it was that she had not heard, it was not possible for the trial court to determine that the missed portions were not "significant." The significance of the unheard portions was simply an unknown, but the fact that she had failed to hear defendant's trial counsel at times suggested that the unheard portions may have been precisely the portions that were critical to the defense case.

The trial court erred in failing to find misconduct. The next question, on which we exercise independent review, is whether the misconduct was prejudicial. There is a

rebuttable presumption that juror misconduct is prejudicial. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108-1109.) We cannot know which portions of the trial Juror #11 was unable to hear, although we do know that most of the portions she failed to hear were things said by defendant's trial counsel. The inference that arises is that she missed some portions of the defense case. This hardly serves to rebut the presumption of prejudice. Consequently, we are compelled to find that the misconduct was prejudicial and requires reversal.[1]

IV. Disposition

The judgment is reversed, and the case is remanded for retrial.

_____
Mihara, J.

I CONCUR:

_____
McAdams, J.

[1] Because we reverse and remand for retrial, it is not necessary for us to reach defendant's claim that his trial counsel was ineffective.

RUSHING, P.J., Concurring and Dissenting

I concur with the majority's rationale on the issue of the motion for a new trial based on juror misconduct. On the issue of the sufficiency of evidence to support the convictions for felony sexual battery, I respectfully dissent. The evidence was insufficient to demonstrate the defendant unlawfully restrained the victim.

The court in *People v. Arnold* (1992) 6 Cal.App.4th 18 (*Arnold*), defined when a person is considered unlawfully restrained for the purposes of a sexual battery as being "when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will; a restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. The 'unlawful restraint required for violation of [Penal Code] section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.' " (*Id*. at p. 28, citing *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661 (*Pahl*).)

In *Arnold*, the victim was the 17-year-old student of the defendant, who was her algebra teacher and with whom she was infatuated. The court reversed one count of sexual battery against the defendant that involved an incident in which defendant and the victim went running together. During the run, the defendant grabbed the girl's buttocks, pulled her toward him and kissed her. The defendant then put both of his hands under her shirt and touched her breasts. The victim pulled away and told the defendant no. Shortly thereafter, the defendant put his hands down the girl's shorts to the top of her underwear. The girl pulled the defendant's hands out of her pants and the two continued to run. The court concluded that the defendant's acts of putting his hands under her shirt and in her shorts were not accomplished by unlawful restraint as required by Penal Code

section 243.4. The court noted that the girl did not initially indicate the touching was unwanted, and when she did tell the defendant to stop, she "was successful in escaping the restraints imposed by the defendant." (*Arnold, supra*, 6 Cal.App.4th at p. 29.)

In reversing the sexual battery conviction, the *Arnold* court specifically rejected the prosecution's argument that the teacher/student relationship between the defendant and the victim created a coercive environment, such that the defendant had authority over the victim. The argument follows that the authority over the victim created the unlawful restraint. The court stated: "We are particularly sensitive to the fact that a minor student, infatuated with a teacher, can be susceptible to participating willingly in an activity that suddenly turns into inappropriate sexual conduct. The conduct of a teacher who takes advantage of such a student, even in the absence of 'unlawful restraint,' is reprehensible. However, the sexual battery statue was not designed to address this type of situation it is neither age nor relationship specific." (*Arnold, supra*, 6 Cal.App.4th at pp 29-30.)

In the present case, like *Arnold*, the majority asserts the nature of relationship between defendant and Gloria, with defendant serving as Gloria's massage therapist, created a situation in which defendant had authority and control over Gloria, amounting to unlawful restraint. However, the evidence shows that although Gloria was clearly familiar with defendant and trusted him, she was not under his control or authority such that she was unlawfully restrained. There is no evidence defendant ever threatened Gloria, nor did he tell her she could not leave. In fact, the door from the massage room to the waiting room was open throughout the entire massage session. Finally, like *Arnold* in which the defendant stopped his sexual advances when the victim told him no, here, when Gloria asked defendant what he was doing, he got off of her and stopped touching her

immediately. Like *Arnold*, there is no evidence defendant used any force to overcome Gloria's resistance to his sexual touching.

In addition to the relationship component of the case, the majority also asserts defendant restrained Gloria by "straddling her on top of the massage table," and incapacitating her with three shots of brandy during the massage.

Initially, defendant's act of straddling Gloria while she was on the massage table did not constitute unlawful restraint, because there is no evidence defendant applied any pressure to her, or in fact, touched her at all while doing it. Gloria testified that defendant placed his knees on either side of her, but that she could not feel his knees or his legs. She further testified she heard defendant masturbating himself, and eventually, he rubbed his penis on her and smeared wetness on her leg. The rubbing lasted a "couple of seconds." Gloria did not say that defendant sat on her, laid on her, or used any amount of force to restrain her in any way. Indeed, the only touching Gloria testified to was defendant rubbing his penis on her and smearing wetness on her. As stated in *Arnold*, the " 'unlawful restraint required for violation of [Penal Code] section 243.4 *is something more than the exertion of physical effort required to commit the prohibited sexual act*.' " (*Arnold*, *supra*, *6* Cal.App.4th at p. 28; emphasis added.) Here, there is nothing more than the prohibited sexual act of rubbing his penis against Gloria as alleged in count 2 to constitute unlawful restraint for the purposes of Penal Code section 243.4. In addition, there is no evidence defendant did anything to restrain Gloria while pulling her pants and the sheet down as alleged in count 1.

With regard to the brandy, Gloria testified that defendant gave her and her husband brandy or other alcoholic drinks during massage sessions in the past. The evidence suggests alcohol consumption was part and parcel of defendant's massage practice, and not a means to restrain people to commit sexual acts.

Moreover, Gloria willingly accepted defendant's offer of alcohol on the date of the incident, as she had done on numerous occasions before.

In cases in which courts have found sufficient evidence of sexual battery, the restraint employed by the defendants was far greater than defendant's conduct in the present case. For example, in the one count of sexual battery that was upheld in *Arnold*, the defendant barred the door so the victim could not escape. He then asked her why she was frightened and why she was avoiding him. The defendant put his hands down the victim's shirt and touched her breasts. The victim managed to push him away and escape through another door. The court concluded that the evidence that the defendant barred the door to prevent the victim's escape was sufficient to establish the unlawful restraint required for a sexual battery. (*Arnold, supra, 6* Cal.App.4th at p. 22-23.)

Here, unlike the barred door incident in *Arnold*, defendant did nothing to prevent Gloria's movement. Indeed, Gloria testified that the door between the massage room and the waiting was open the entire time she was there. Defendant did not use any words or comments as in *Arnold*, to elicit fear in Gloria, as the defendant in *Arnold* did, by asking the victim why she was afraid and avoiding him. Moreover, Gloria did not demonstrate any fear of defendant, and when she did ask him what he was doing when he was straddling her, defendant immediately stopped touching her. The circumstances in the present case are far different than those in *Arnold* in which the court affirmed the conviction for sexual battery.

In both *People v. Alford* (1991) 235 Cal.App.3d 799 (*Alford*), and *People v. Pahl, supra*, 226 Cal.App.3d 1651, the courts found sufficient evidence of unlawful restraint to support convictions for sexual battery where the defendants employed means of restraint that sufficiently prevented the victims from stopping the attack. For example, in *Alford*, the defendant was a correctional officer

transporting female inmates. While the inmates were handcuffed, the defendant partially undressed and fondled them. Although initially lawfully restrained in the handcuffs, the inmates became unlawfully restrained when the defendant took advantage of the restraint to accomplish the unlawful purpose of fondling them. (*Alford, supra,* 235 Cal.App.3d at pp. 803-804.)

Like *Alford,* in *Pahl*, the defendant employed means of restraint that prevented the victim from escaping in order to accomplish the sexual purpose. In *Pahl*, the victim was on a date with the defendant, and when she said she wanted to go home, he drove her to a secluded spot. While there, the defendant overcame the victim, removed her clothes and assaulted her. The defendant in *Pail* unlawfully restrained the victim through his act of taking her to a secluded place, and overcoming her physical resistance. (*People v. Pahl, supra,* 226 Cal.App.3d at p. 166.)

Unlike both *Alford* and *Pahl*, in the present case, the defendant employed no more force than necessary to accomplish his act of rubbing his penis against Gloria's buttocks. There is no evidence he prevented her escape, or that he used fear or other means to prevent her from stopping the attack. Notably, when Gloria asked him what he was doing and told him to stop, defendant immediately stopped touching her.

I would find the evidence presented at trial was insufficient to meet the requirements of unlawful restraint for the convictions of felony sexual battery in counts 1 and 2.

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RUSHING, P.J.